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88-247

Supreme Court, U.S.
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NO.

in the
# Supreme Court
of the
# United States

October Term 1988

CORRECTED COPY

PRUDENTIAL-BACHE SECURITIES INC.,

*Petitioner,*

*vs.*

J. RICHARD FINN and REGINA R. FINN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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and

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## QUESTION PRESENTED

Whether the state appellate court erred by creating a substantive rule of law under the Federal Arbitration Act that is in direct conflict with federal law, where this Court has held that the FAA creates a body of federal substantive law of arbitrability, which is applicable in both state and federal courts and which preempts state law to the contrary. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

## TABLE OF CONTENTS


PAGE

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF CASE ..... 2

REASONS FOR GRANTING WRIT ..... 5

THE STATE COURT'S DECISION REGARDING WAIVER UNDER THE FEDERAL ARBITRATION ACT IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT AND THE MANDATE OF CONGRESS, AND PRESENTS A QUESTION OF GREAT NATIONAL IMPORTANCE

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 11

## TABLE OF CONTENTS—(Continued)

PAGE

APPENDICES


APPENDIX A— Order Staying Action and Compelling Arbitration

APPENDIX B— *Finn v. Prudential-Bache Securities, Inc.*, 523 So.2d 617 (Fla. 4th DCA 1988)

APPENDIX C— Order Denying Petition for Rehearing

APPENDIX D— Federal Arbitration Act 9 U.S.C. §2, 3 and 4.

## TABLE OF AUTHORITIES


| Case | Page |
|---|---|
| *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172 (9th Cir. 1983) | 6 |
| *Benoay v. Prudential-Bache Securities, Inc.*, 805 F.2d 1437 (11th Cir. 1986) | 6 |
| *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238 (1985) | 5 |
| *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*, 599 F.2d 268, 269 (5th Cir. 1977) *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246 (1978) | 7 |
| *Finn v. Prudential-Bache Securities, Inc.*, 523 So.2d 617 (Fla. 4th DCA 1988) | *passim* |
| *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691 (9th Cir. 1986) | 6 |
| *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984) | 8 |
| *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 107 S.Ct. 1046 (1987) | 8 |
| *In re Emergency Amendments To Rules, Etc.*, 381 So.2d 1370 (Fla. 1980) | 3 |
| *Local 174, Teamsters, etc. v. Lucas Flour Co.*, 369 U.S. 101, 82 S.Ct. 571 (1962) | 8 |
| *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494 (5th Cir. 1986) | 6 |

## TABLE OF AUTHORITIES—(Continued)


| Case | Page |
|---|---|
| *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 105 S.Ct. 3346 (1985) | 5 |
| *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 103 S.Ct. 927 (1983) | 5, 6 |
| *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 712 F.2d 270, 272 (7th Cir. 1983), *cert. denied,* 464 U.S. 1002 (1983) | 6 |
| *Perry v. Thomas,* ____U.S.____, 107 S.Ct. 2520 (1987) | 5, 8 |
| *Price v. Drexel Burnham Lambert, Inc.,* 741 F.2d 115 (5th Cir. 1986) | 6 |
| *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801 (1967) | 5, 6 |
| *Shearson/American Express, Inc. v. McMahon,* ____U.S.____, 107 S.Ct. 2332 (1987) | 5 |
| *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984) | *passim* |
| *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893 (1970) | 8 |

## TABLE OF AUTHORITIES—(Continued)


| OTHER AUTHORITIES | Page |
|---|---|
| Article V, Section 3(b), Florida Constitution (1980) | 3 |
| Federal Arbitration Act 9 U.S.C. §2, et seq. | *passim* |
| 28 U.S.C. §1257(3) | 2, 9 |
| Fla.R.App.P. Rule 9.030(a) | 3 |

NO.

# In the Supreme Court of the United States

October Term 1988

PRUDENTIAL-BACHE SECURITIES INC.,

*Petitioner,**

*vs.*

J. RICHARD FINN and REGINA R. FINN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

Prudential-Bache Securities Inc. ("Prudential-Bache") petitions for a Writ of Certiorari to review the judgment of the Fourth District Court of Appeal for the State of Florida.

*The parent company of Prudential-Bache Securities Inc. is the Prudential Insurance Company of America.

## OPINIONS BELOW

The order of the circuit court of Palm Beach County staying action and compelling arbitration (App. A) is unreported; the opinion of the court of appeal (App. B) is reported at 523 So.2d 617; the order of the court of appeal denying Prudential-Bache's petition for rehearing (App. C) is unreported.

## JURISDICTION

Petitioner seeks review of the judgment of the state court of appeal rendered on May 12, 1988. The opinion of the state court of appeal was entered on February 24, 1988. The petition for rehearing was denied on May 12, 1988. This court has jurisdiction to issue the requested writ under 28 U.S.C. §1257(3).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §2, 3 and 4 are reproduced at App. D.

## STATEMENT OF CASE

### A. Course of Proceedings and Disposition.

Prudential-Bache filed a motion to compel arbitration in the Florida circuit court pursuant to the Federal Arbitration Act. The trial court granted the motion, and the Finns appealed to Florida's Fourth District Court of Appeal.

The Fourth District Court reversed the order compelling arbitration, ruling that Prudential-Bache waived its right to arbitration under the FAA by taking inconsistent acts. *Finn v. Prudential-Bache Securities, Inc.*, 523 So.2d 617 (Fla. 4th DCA 1988) ("*Finn*"). The holding of the court is that

inconsistent acts, standing alone, constitute waiver under the FAA and that no showing of prejudice is necessary.

Because the *Finn* decision directly conflicts with binding precedent of the United States Supreme Court, Prudential-Bache has filed a petition to invoke the discretionary jurisdiction of the Florida Supreme Court in order to exhaust its state-court remedies. However, Florida law does not provide for discretionary jurisdiction in the state Supreme Court on the basis of a conflict with federal law. Fla.R.App.P. 9.030(a). Accordingly, it is quite possible that the Fourth District Court constitutes the "court of last resort" in Florida for Prudential-Bache.[1]

Meanwhile, on remand, the state trial court has specially set the case for jury trial in January 1989.

B. **Statement of Facts.**

The Finns signed four separate agreements to arbitrate "any controversy" relating to their investment account at Prudential-Bache. Nevertheless, when a controversy arose, the Finns filed parallel lawsuits in state and federal court against Prudential-Bache.

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[1]In 1980, Florida voters approved constitutional modifications to the state Supreme Court's jurisdiction. *See* Article V, Section 3(b), Florida Constitution (1980). The impetus for these modifications was a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, revised Fla.R.App.P. 9.030(a) limits the Supreme Court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state. Thus, Florida district courts of appeal constitute the courts of last resort for the vast majority of litigants under amended Article V. *In re Emergency Amendments to Rules, Etc.*, 381 So.d 1370 (Fla. 1980).

Prudential-Bache filed a motion to compel arbitration of the Finns' claims pursuant to the FAA in the state court.[2] The trial court granted the motion and compelled arbitration and the Finns appealed to the Fourth District Court.

The Fourth District held that Prudential-Bache had waived its right to arbitration by taking "inconsistent acts."[3] The court stated that the Finns did *not* have to show prejudice because inconsistent acts, standing alone, constitute waiver under the FAA.

Prudential-Bache filed a motion for rehearing en banc on the ground that the court's holding directly conflicts with federal law, which requires a showing of inconsistent acts *and* prejudice to constitute waiver. The Fourth District denied the petition for rehearing.

Prudential-Bache has filed an appeal to the Florida Supreme Court, but the court has not yet ruled on the petition to invoke discretionary jurisdiction. This Petition for Writ of Certiorari followed.

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[2]Prudential-Bache also filed a motion to compel arbitration of the claims in federal court. The motion has been pending before the Honorable Judge Alcee Hastings since September of 1987.

[3]It is important to note the nature of the "inconsistent acts" which prompted the Fourth District to find waiver. Because of dramatic changes regarding arbitration in Florida and federal law during 1984 and 1985, the Finns' claims were non-arbitrable at the beginning of the case and *then arbitrable for only 35 days* before they became non-arbitrable by virtue of a Florida Supreme Court decision. The Fourth District held that Prudential-Bache waived its right to arbitration during the 35-day window of arbitrability. However, Prudential-Bache took absolutely no action in the case during those 35 days. Only two activities occurred in the litigation when the Finn claims were arbitrable, and Prudential-Bache did not participate in either activity. First, the court entered an Order denying an earlier filed motion for summary judgment, denying an earlier motion for protective order, and granting the Finns' motion to compel discovery. Second, the Finns filed a motion to set the case for trial. Obviously, these activities did not prejudice the Finns.

## REASONS FOR GRANTING WRIT

### THE STATE COURT'S DECISION REGARDING WAIVER UNDER THE FEDERAL ARBITRATION ACT IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT AND THE MANDATE OF CONGRESS, AND PRESENTS A QUESTION OF GREAT NATIONAL IMPORTANCE.

### A. Introduction.

The state appellate court has rejected 20 years of Supreme Court precedent and the national policy favoring arbitration.[4] Congress enacted the FAA to guarantee the enforcement of arbitration agreements across the land "unencumbered by state-law constraints." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984). The FAA creates a body of federal substantive law endowed "with pre-emptive force under the Supremacy Clause." *Perry v. Thomas*, 107 S.Ct. 2520, 2526 (1987); *Southland*, 465 U.S. 1. Incredibly, Florida's Fourth District Court of Appeal has taken the position that state law preempts federal law on the issue of whether Prudential-Bache waived its right to arbitrate under 9 U.S.C. §3.

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[4]Since 1967, the Supreme Court has consistently held that federal law—not state law—governs the enforceability of arbitration agreements involving interstate commerce. *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332 (1987); *Perry v. Thomas*, 107 S.Ct. 2520 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

B. **Preemption of State Law Under the FAA.**

In *Finn*, the Fourth District held that inconsistent acts, standing alone, constitute waiver under the Federal Arbitration Act and that no showing of prejudice is required. 523 So.2d at 619-620. This holding was based solely on two Florida appellate court decisions. The Fourth District relied on Florida law even though Prudential-Bache forcefully argued that federal law preempted conflicting state law.

It is firmly established that federal law is controlling on the issue of whether Prudential-Bache waived its right to arbitrate under the FAA, notwithstanding any contrary state rule. *Prima Paint*, 388 U.S. 395 (1967); *Moses H. Cone*, 460 U.S. 1; *Miller Brewing Company v. Fort Worth Distrib. Co.*, 781 F.2d 494 (5th Cir. 1986). Indeed, the concept of waiver expressly arises under the default provision of the FAA, 9 U.S.C. §3. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 272 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983).

Federal law expressly requires a showing of both inconsistent acts and actual prejudice to support a finding of waiver. *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172 (9th Cir. 1983); *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691 (9th Cir. 1986); *Price v. Drexel Burnham Lambert, Inc.*, 741 F.2d 115 (5th Cir. 1986); *Benoay v. Prudential-Bache Securities, Inc.*, 805 F.2d 1437 (11th Cir. 1986).[5]

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[5]The Supreme Court has repeatedly stated the "Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of *waiver, delay, or a like defense to arbitrability.*" *Moses H. Cone*, 460 U.S. at 24-25 [emphasis supplied].

Under federal law, "prejudice is the essence of waiver." *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 599 F.2d 268, 269 (5th Cir. 1977) *cert. denied*, 434 U.S. 1067 (1978). "Inconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice." *ATSA of California*, 702 F.2d at 175. Despite this well-established federal law, the Fourth District ignored Supreme Court precedent and the Supremacy Clause to deny Prudential-Bache's right to arbitration, holding that "a showing of prejudice is not required if waiver is based upon inconsistent acts." *Finn*, 523 So.2d at 619-620.

The fact is that the Finns could not show prejudice resulting from any inconsistent acts taken by Prudential-Bache. Under the unprecedented rule of law created by *Finn*, the arbitration agreements signed by the Finns would be enforceable in federal court, but not in state court. The Florida court has ignored and rejected Supreme Court precedent and congressional intent embodied in the FAA.

In *Southland*, this Court recognized that Congress enacted the FAA because of "the widespread unwillingness of state courts to enforce arbitration agreements." *Id.*, 465 U.S. at 13. In acknowledging the judicial hostility to arbitration, this Court held that federal law is paramount on the issue of arbitration in state courts, as well as federal courts:

> To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.
>
> * * *

> And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe that Congress intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction.

*Southland*, 465 U.S. at 14-16.

In *Finn*, the Florida appellate court ignored the mandate of Congress and this Court. Under federal law, a litigant must show both inconsistent acts *and* prejudice to prove waiver. In Florida, a litigant need only show inconsistent acts—no matter how insignificant.

Thus, there is an unmistakable conflict between federal and Florida law and, by virtue of the Supremacy Clause, Florida law "must give way." *Perry*, 107 S.Ct. at 2526.

### C. A Word About Jurisdiction

Because of previously-mentioned modifications to the Florida Constitution, the state Supreme Court may decline to invoke its discretionary jurisdiction to review this conflict with federal law. *See supra* note 1 and accompanying text. Accordingly, the U.S. Supreme Court is probably the only court that can quash *Finn* and prevent an erosion of the national policy favoring arbitration.

On previous occasions, this Court has invoked its certiorari jurisdiction to review judgments from intermediate appellate courts where the structure of the state judicial system prohibited a party from presenting a federal question for review in the state Supreme Court. *Florida v. Meyers*, 466 U.S. 380 (1984); *Local 174, Teamsters, etc. v. Lucas Flour Co.*, 369 U.S. 101 (1962); *Williams v. Florida*, 399 U.S. 78 (1970); *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987). In such circumstances, this Court has consistently

held that "the decision below constitute[s] a final judgment under 28 U.S.C. §1257(3)." *Meyers*, 466 U.S. at 381.

Such immediate review by this Court is particularly important in the context of the FAA:

> For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate.

*Southland*, 465 U.S. at 8.

The state trial court has specially set the case for jury trial in January, 1989. Unless this Court invokes its certiorari jurisdiction and reverses *Finn*, Prudential-Bache will be deprived of its federal right to arbitration and any subsequent appeal will be rendered moot.

## CONCLUSION

This case presents a matter of great national importance. There is a litigation crisis in this country. Congress has responded by establishing a federal right to enforcement of arbitration agreements under the FAA. If litigants are permitted to circumvent the FAA through forum-shopping in state courts, the federal policy favoring arbitration will be eviscerated.

Congress and this Court have attempted to avoid such a result by requiring states to follow federal law on arbitration. The Florida appellate court has rejected this mandate and instead chosen to adopt its own set of rules in direct violation of the Supremacy Clause. For the foregoing reasons, Supreme Court review is warranted and this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 9th day of August, 1988 to: Gloria O. North, Esq., Mattlin, McClosky & North, 5355 Town Center Road, Suite 901, Boca Raton, Florida 33486.

CURTIS CARLSON
LLOYD R. SCHWED

# Appendix

## APPENDIX A

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR,
PALM BEACH COUNTY, FLORIDA

CASE NO. 84-3156 CA (L) N

J. RICHARD FINN and REGINA R. FINN,

*Plaintiffs,*

*vs.*

PRUDENTIAL-BACHE SECURITIES INC., *et. al.,*

*Defendants.*

## ORDER STAYING ACTION AND COMPELLING ARBITRATION

THIS CAUSE came on for hearing on April 11, 1985, upon the motion of the Defendant, Prudential-Bache Securities, Inc., for entry of an order staying this action and compelling the Plaintiffs to arbitrate their claims, and the Court having considered said motion along with argument and the applicable case law submitted by counsel for both parties, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that said motion to stay this action and compel arbitration be and the same is hereby granted, and this cause is hereby stayed pending arbitration; it is

FURTHER ORDERED and ADJUDGED that this Court shall retain jurisdiction over this matter in order to confirm any award that is obtained in arbitration.**

DONE and ORDERED in chambers at West Palm Beach, Florida, on this 11th day of April, 1985.

/s/
Circuit Court Judge

Copies to:
Fred W. Mattline, Esquire
Richard Levenstein, Esquire
Curtis Carlson, Esquire

***Due to the extensive pre-trial preparation and late date (trial was scheduled to begin April 15, 1985) of the entry of this order, this Court encouraged a speedy setting and disposition of this cause in arbitration and suggests this matter be concluded within 90 days.*

## APPENDIX B

[DOCKETED 3/7/88]

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1988

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.**

CASE NO. 85-1118.

J. RICHARD FINN and REGINA R. FINN,

*Petitioners,*

*v.*

PRUDENTIAL-BACHE SECURITIES, INC.,
a Delaware corporation,

*Respondent.*

Opinion filed February 24, 1988

Petition for writ of common law certiorari to the Circuit Court for Palm Beach County; Harold J. Cohen, Judge.

Gloria Ohsman North of Siemon, Larsen, Mattlin & Purdy, Boca Raton, for petitioners.

Curtis Carlson of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, for respondent.

HERSEY, C.J.

Petitioners seek review by way of certiorari of an order granting a motion to compel arbitration.

On June 1, 1984, the petitioners filed a complaint against the respondent and one of its former employees, alleging various counts for negligent misrepresentation, fraud, and violation of sections 517.301 and 895.03(3), Florida Statutes. Respondent answered and filed a counterclaim against the petitioners. On July 17, 1984, respondent filed a motion for summary judgment which was denied. A considerable number of discovery requests and pretrial motions were thereafter filed by both parties and the case was set for trial. On April 8, 1985, respondent filed its motion to compel arbitration, which resulted in the order now before us for review.

The issue is whether respondent waived its contractual right to arbitration by participating in litigation, an act inconsistent with its right to compel arbitration.

A party's contractual right to arbitration may be waived by active participation in a lawsuit or by taking action inconsistent with that right. *Klosters Roderi A/S v. Arison Shipping Co.*, 280 So.2d 678 (Fla. 1973), *cert. denied*, 414 U.S. 1131, 94 S.Ct. 896, 38 L.Ed.2d 755 (1974); *Lapidus v. Arlen Beach Condominium Association*, 394 So.2d 1102 (Fla. 3d DCA 1981); *King v. Thomson & McKinnon, Auchincloss Kohlmeyer, Inc.*, 352 So.2d 1235 (Fla. 4th DCA 1977); *Gettles v. Commercial Bank at Winter Park*, 276 So.2d 837 (Fla. 4th DCA 1973); *Ojus Industries, Inc. v. Mann*, 221 So.2d 780 (Fla. 3d DCA 1969). The issue in the present case is clouded, however, by the fact that during much of the pertinent time frame, June of 1984 to August of 1985, the law in Florida with regard to the enforceability of agreements to arbitrate claims under Florida securities laws was in a state of flux.

At the time petitioners filed their complaint in state court on June 1, 1984, the most recent pronouncement from this district on the issue of enforceability of arbitration agreements was in *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed,* 405 So.2d 790 (Fla. 4th DCA 1981), *rev. denied,* 433 So.2d 519 (Fla. 1983) (*Melamed I*), where this court held that state courts must recognize and apply the Federal Arbitration Act, and that arbitration agreements which are valid and enforceable under the federal law are also valid and enforceable in Florida courts.

In 1983 the third district decided *Young v. Oppenheimer & Co.,* 434 So.2d 369 (Fla. 3d DCA 1983), which held that arbitration of alleged fraud, misrepresentation and breach of fiduciary duties is not consistent with the policy and language of the Florida Securities Act, and agreements to arbitrate controversies cannot oust courts of jurisdiction conferred upon them by organic law. *See also Merrill Lynch Pierce Fenner & Smith, Inc. v. Westwind Transportation, Inc.,* 442 So.2d 414 (Fla. 2d DCA 1983) (denial of motion to compel arbitration of state securities claims held to be error).

The conflict between the districts became more pronounced when *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed,* 453 So.2d 858 (Fla. 4th DCA 1984) (*Melamed II*), was decided on July 13, 1984, in which this court held that as to claims arising under the Florida securities law arbitration agreements are binding and enforceable.

The conflict was temporarily resolved when the Florida Supreme Court, on September 27, 1984, ruled that an arbitration agreement concerning disputes in securities is *un*enforceable. *Oppenheimer & Co. v. Young,* 456 So.2d 1175 (Fla. 1984). Subsequently, however, the United States Supreme Court decided *Byrd v. Dean Witter Reynolds, Inc.,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). The issue in that case was whether, when a complaint raises both

federal securities claims and pendent state claims, a federal district court may deny a motion to compel arbitration of the state law claims despite the parties' agreement to arbitrate their disputes. The court held that the Arbitration Act requires the district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.

Thereafter, in *Oppenheimer & Co. v. Young,* 470 U.S. 1078, 105 S.Ct. 1830, 85 L.Ed.2d 131 (1985), on the authority of *Byrd,* the U.S. Supreme Court vacated and remanded the Florida Supreme Court's decision in *Oppenheimer,* and on remand the Florida Supreme Court quashed the district court's decision and rejected the respondent's request that the court reverse its earlier ruling that the petitioner did not waive its right to compel arbitration by failing to invoke the right to compel arbitration when it appeared in federal court. *Oppenheimer & Co., Inc. v. Young,* 475 So.2d 221 (Fla. 1985). The court reasoned that there was a split of authority on the issue, and it would have been pointless to invoke the arbitration agreement.

It could be argued that the same reasoning should be applied here; however, respondent agrees that petitioner's claims were arbitrable during that period of time between this court's decision on July 13, 1984, in *Melamed II,* holding that arbitration agreements are binding and enforceable as to claims arising under the Florida securities laws, and the Florida Supreme Court's decision on September 27, 1984, in *Oppenheimer & Co. v. Young,* 456 So.2d 1175 (Fla. 1984), holding arbitration agreements unenforceable. Respondent, during that period of time, filed a motion for protective order, a motion for summary judgment, objections to interrogatories, and objections to petitioners' request for admissions and production of documents. We therefore conclude that the

respondent actively pursued this litigation in the lower court without raising the agreement providing for arbitration, thereby waiving its right to compel arbitration.

Respondent argues that the party opposing arbitration must make a strong showing of both inconsistent acts *and* actual prejudice. However, the cases cited by respondent make it clear that actual prejudice must be shown only where there is a finding of waiver based on delay in assertion of one's right. A showing of prejudice is not required if waiver is based upon inconsistent acts. *Melamed II; Graham Contracting, Inc. v. Flagler County,* 444 So.2d 971 (Fla. 5th DCA 1983), *rev. denied,* 451 So.2d 848 (Fla. 1984). Respondent here waived not by inaction, but rather by inconsistent acts.

Our determination of this issue renders it unnecessary to consider other issues argued by the parties. We grant the petition for writ of certiorari and quash the lower court's ruling which granted respondent's motion to compel arbitration.

CERTIORARI GRANTED; ORDER QUASHED.

LETTS and GLICKSTEIN, JJ., concur.

## APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 85-1118.

J. RICHARD FINN and REGINA R. FINN,

*Petitioner(s),*

*v.*

PRUDENTIAL-BACHE SECURITIES, INC.,
a Delaware corporation,

*Respondent(s).*

May 12, 1988

BY ORDER OF THE COURT:

ORDERED that the Respondent's March 10, 1988, Motion for Rehearing and Motion for Rehearing En Banc is hereby denied.

FURTHER ORDERED that the Respondent's April 6, 1988, Motion for Leave to file Reply is granted.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath

CLYDE L. HEATH,
CLERK.

cc: Curtis Carlson, Esq.
Gloria O. North, Esq.
Richard Levenstein, Esq.

pab

## APPENDIX D

[374] * * *

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

### § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

### § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement

for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.